The Redrafting of UCC Articles 2 and 9: Model Codes or Model Dinosaurs

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THE REDRAFTING OF UCC ARTICLES 2 AND 9: MODEL CODES OR MODEL DINOSAURS?

Gail Hillebrand*

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I. INTRODUCTION

The drafters of revised Articles 2 and 9 of the Uniform Commercial Code (UCC or Code) have a choice: to draft truly modern model laws or to propose model dinosaurs that are unlikely to be adopted in a majority of states. The UCC is a source of the basic law governing contracts between consumers and commercial entities.¹ The UCC is a commercial code, but the commerce which it governs is not limited to commerce between businesses.

Modern model articles must include standards and rules that will operate fairly in transactions between consumers and commercial parties. This will require reexamining and modifying rules that were originally drafted for the individually negotiated transaction between commercial entities. Consumer contracts with commercial parties are

¹ The National Retail Federation stated that Article 2 “governs nearly every retail consumer sale, and has an effect on every commercial purchase as well.” Letter from Michael J. Altier, Vice President and General Counsel, National Retailers Federation, to the National Conference of Commissioners on Uniform State Laws 1 (Apr. 19, 1994) (on file with author).
rarely individually negotiated, except for the price term for some types of products, for example, cars. Consumers do not have the freedom to bargain for specific rights and remedies or for particular contract terms. Sales representatives and loan agents generally lack the power to alter a preprinted contract even if a consumer asks them to do so. A modern model code would recognize that differences between the negotiated transaction and the mass market consumer transaction call for different default rules, such as restrictions on waiver, restrictions on contractual changes in the default rules, and consumer protections appropriate to the transactions governed by the particular article. A model dinosaur, by contrast, would continue to treat consumer and commercial transactions identically in most cases. It would also continue to assume that all transactions occur between parties with bargaining power, access to legal counsel, similar information, and reasonable alternatives to the contract terms being offered.

This piece will discuss some of the progress that has been made toward making Article 2 a modern model act, identify a few areas requiring further work, and then focus on ways in which the drafters of Article 9 could bring it into conformity with some of the realities of modern consumer transactions.

II. THE ARTICLE 2 DRAFTING EFFORT

A. Progress in Article 2

The current Article 2 Discussion Draft has made a good start on the task of revising Code principles to fit the nonnegotiated consumer transaction.\(^2\) For example, the current Discussion Draft codifies an approach which recognizes the strong potential for unfair results from

\[^2\] U.C.C. Revised Article 2. Sales, Parts 3, 4, 5 and 6, § 2-318(e) (Discussion Draft Feb. 28, 1994) [hereinafter Discussion Draft, Feb. 28, 1994]. Drafts are for discussion purposes only until presented to, and finally approved by, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI). Some of the concepts in the Article 2 draft will have received their first exposure to NCCUSL at its summer 1994 meeting. The full draft, however, will not be read by the Conference until 1995 or later. All drafts of Articles 2 or 9 cited herein contain the disclaimer,

\[\text{[t]he ideas and conclusions herein set forth, including drafts of proposed legislation, have not been passed upon by the National Conference of Commissioners on Uniform State Laws. They do not necessarily reflect the views of the Committee, Reporters, or Commissioners. Proposed statutory language, if any, may not be used to ascertain legislative meaning of any promulgated final law.}\]

U.C.C. Revised Article 2. Sales, Parts 1, 2, 3 and 7. This discussion is intended to reflect the direction of the drafters, based on this Author's observation of the work of the drafting committees for Articles 2 and 9. The discussion of the direction that these committees may have taken on some issues is not intended to suggest that they have made final
boilerplate disclaimers of implied warranties of merchantability and fitness.\(^3\) The draft does this by requiring proof of true agreement to terms purporting to disclaim the implied warranty of merchantability or the implied warranty of fitness for a particular purpose before such disclaimers can be enforced.

The draft also eliminates the statute of frauds\(^4\) that, according to attorneys who represent consumers, is used as a pleading hurdle by commercial entities attempting to avoid obligations that might otherwise have been created by the oral promises of their representatives.

**B. Some Problem Areas in Article 2**

1. Limitations on nonprivity warranty suits

In another potentially positive change, the Article 2 Discussion Draft recognizes that a manufacturer who makes affirmations or promises about its products in local, regional, or national advertising should be held to those promises as express warranties to its ultimate consumers.\(^5\) This proposal, in effect, recognizes that limitations on vertical privity are outmoded. However, serious questions remain about the scope of remedies that will be available to persons not in privity. The Discussion Draft contains a proposal that would allow a party not in privity to escape liability for consequential damages by replacing the goods or refunding the price, in addition to paying any

\(^3\) U.C.C. § 2-318(e). Other protections addressing boilerplate contract language that would have been desirable for consumers, however, were not added to the draft. For example, the drafting committee had previously declined to adopt a proposal that a merger clause in a standard form contract selling consumer goods would be inoperative against a consumer. The drafting committee also rejected a motion that a merger clause in a standard form contract for consumer goods would be unenforceable without proof by clear and convincing evidence that the consumer "understood and expressly agreed to" the clause. U.C.C. REVISED ARTICLE 2. SALES, PARTS 1, 2, 3 AND 7, § 2-202, reporter's note at 11 (Discussion Draft Dec. 21, 1993) [hereinafter Discussion Draft, Dec. 21, 1993].

Oral promises attempting to be disclaimed by a merger clause will be subject to the rule of revised § 2-202. The draft makes it clear that in considering whether a writing is intended to be final, complete, and exclusive, a court should consider all admissible evidence—including evidence of prior oral or written agreements or representations. The reporter's notes indicate that the section was designed to permit a court to deny operation to the merger clause where there is "unfair surprise or no real assent." Discussion Draft, Dec. 21, 1993, supra note 3, § 2-202, reporter's note at 11.


incidental damages.\textsuperscript{6} That provision had not yet been discussed by the drafting committee as of July 1994. It is not clear whether the damage limitation proposal would apply to personal injury claims, but it may be that this result is not intended.\textsuperscript{7} Even if the proposed “refund or replace” remedy is only a substitute for other remedies for economic loss, it would reduce existing consumer rights in several major states.\textsuperscript{8}

This proposed remedy restriction is unfair to consumers. Consumers will have foreseeable consequential damages far less frequently than commercial parties, and generally in far smaller amounts. But even relatively small consequential damages can financially impact a family. Suppose, for example, that a manufacturer of fire extinguishers advertises that its product is “best for all types of household fires,” when, in fact, that fire extinguisher is best suited to extinguishing wood and cloth fires, and another type of extinguisher is better suited to extinguishing kitchen grease fires.\textsuperscript{9} The consequential loss to a consumer who purchases this product for the kitchen is quite foreseeable. If the extinguisher fails to put out a kitchen fire, the consumer will have both damage from the fire itself, plus other foreseeable consequential damages such as the cost of purchasing pre-

\textsuperscript{6} Discussion Draft, Feb. 28, 1994, supra note 2, § 2-313(c). It is also not clear whether the substitute “refund or replace” remedy is intended to eliminate the ability to seek direct damages. As presently drafted, the language suggests that all damages except incidental damages would be eliminated. However, that language has not yet been discussed by the drafting committee. It is hard to believe that the drafters’ intent would be to permit incidental damages but eliminate direct damages. Perhaps the thought is that as a result of the refund or replacement of the goods, there will be no further direct damages.

\textsuperscript{7} See, Clifford, supra note 5, § 2-318 III(B). Professor Clifford argues that as currently drafted, the § 2-719 ban excluding consequential damages for personal injury in consumer contracts may not override the § 2-318(d)(2) substitute remedy because: (1) the injured party may not be in a “consumer contract” with the offending party; and (2) the exclusion of consequentials in § 2-318(d)(2) is statutory, not contractual. Therefore, the prohibition in § 2-719 against contractual exclusion of personal injury consequential damages would not restrict the statutory exclusion of personal injury consequentials in § 2-318(d)(2). Professor Clifford points out that the drafting committee will have to modify § 2-318(d)(2) if it decides to apply the intent of the § 2-719 ban to the statutory refund or replace mechanism. \textit{Id.}

\textsuperscript{8} See, e.g., Letter from Michael M. Greenfield, Professor of Law, Washington University in St. Louis Law School, to Richard E. Spiedel, Professor of Law, Northwestern University Law School (Feb. 1, 1994) (on file with author) (stating that restriction on consequential damages when party not in privity has cured eliminates existing consumer rights to seek consequential damages from party not in privity in at least five states—including major population centers such as New Jersey, Pennsylvania, and Texas).

\textsuperscript{9} See Fire Extinguishers: Rating the Flame Fighters, \textit{Consumer Rep.}, May 1994, at 340 (recommending different type of fire extinguisher for so-called type B and C fires—kitchen and electrical fires—than for so-called type A fires—wood, cloth, or upholstery fires).
pared food for his or her family while waiting for the damage to the kitchen to be repaired. In some states, the fire damage itself also may be consequential. The manufacturer should not be able to avoid responsibility for these damages by simply supplying another fire extinguisher.

This problem could be addressed by eliminating the restriction on consequential damages in section 2-318(d)(2) for transactions involving consumer goods. A narrower solution would be to restrict the limitation in section 2-318(d)(2) to consequential damages which are lost profits. This remedy could be used either in all cases or just in those cases involving consumer goods. This would permit consumers to secure foreseeable consequential damages such as the fire damage and the cost of living without a kitchen during repairs, while avoiding extended litigation about whether these damages should be characterized as direct, incidental, or consequential. The narrower restriction limited to lost profits, rather than to all consequential damages, would allow the refund or replace remedy to displace the “lost profit” type of consequential damages but not other more predictable types of consequential damages.

2. Failure to include an attorneys fees provision in the unconscionability section

The current Article 2 draft also retreats from a consumer protection position taken by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in Article 2A. It fails to include an attorneys fees provision similar to section 2A-108(4). That section requires a court to award attorneys fees to a prevailing consumer claiming and proving unconscionability with respect to a consumer lease. It permits attorneys fees to be awarded against a losing consumer only if the consumer has brought or maintained a groundless action. Provisions for attorneys fees to prevailing consumers are a widely used means to encourage enforcement of statutory standards of conduct.¹⁰

Where such provisions also permit a creditor or other commercial party to recover attorneys fees, they are similar to section 2A-108 in that they limit fee awards against a consumer to cases brought or maintained in bad faith.11

This type of attorneys fees provision addresses, in small measure, some of the inherent litigation advantage a commercial entity may have over an individual. A business may have an interest in prevailing in the particular case which far exceeds the amount of money at stake in that case, because it has engaged or wishes to engage in the challenged practice with other customers. Because a large business may have counsel on staff, it may more readily engage in litigation. An attorneys fees provision for prevailing consumers, such as that found in section 2A-108(4), acts to partially level this tilt in the playing field.

Finally, although the important standard of unconscionability in the inducement in section 2A-108 has been included in the Article 2 Discussion Draft, the portion of section 2A-108 dealing with unconscionable collection activities was excised by the drafting committee.

These and many issues for consumers in Article 2 have been well covered by other authors.12 Although Article 2 still raises many serious and important issues for consumers, the drafting committee appears to have made a fundamental decision to recognize that the Article covers not only individually bargained for transactions, but also millions of nonnegotiated transactions involving ordinary consumers. The drafting committee appears to be evaluating proposed rules in light of their impact on ordinary consumers, an approach that is necessary to create a draft that will provide for a fair and balanced statute. Only such a draft will be a modern model code rather than a model dinosaur.

III. THE NEED TO MODERNIZE ARTICLE 9

A. The Article 9 Revision Effort's Initial Focus Has Been Improvements for Creditors

The Article 9 drafting process is newer than the Article 2 process. It remains to be seen whether that process will result in a fair and balanced statute. The study committee report states that "problems


relating to business credit transactions were the principal impetus for the Committee’s study, and its recommendations reflect these concerns.\textsuperscript{13} However, the study committee report also recognizes that more work is needed on the impact on consumers of a variety of its proposals.\textsuperscript{14}

The study committee’s recommendations include specific proposals to increase creditor’s rights—for example, adopting the “rebuttable presumption” rule for commercial transactions where there is a defect in the disposition of the collateral.\textsuperscript{15} This rule would significantly increase creditors’ rights in the minority of states which now use the “absolute bar” rule for both commercial and consumer transactions.\textsuperscript{16} To its credit, the study committee did not recommend imposing the rebuttable presumption test in transactions where the collateral is consumer goods. Instead, it recommended that a secured party who fails to comply with Part 5 be barred from recovering a deficiency in consumer transactions.\textsuperscript{17}

Another study committee recommendation aimed at increasing creditor rights would eliminate the requirement of possession of collateral to accomplish strict foreclosure under section 9-505.\textsuperscript{18} The study committee also suggested revisions to Part 5, or to its official comments, which would deny that delay in disposition of collateral could be a constructive strict foreclosure.\textsuperscript{19}

\textsuperscript{13} Permanent Editorial Bd. For the Uniform Commercial Code, PEB Study Group, Uniform Commercial Code Article 9 Report 3 n.9 (Dec. 1, 1992) [hereinafter Study Group Report].

\textsuperscript{14} Id. In addition, the chair of the Article 9 Drafting Committee has actively invited consumer groups and advocates to participate in the drafting process. \textit{Id.} Unfortunately, most groups representing consumers are simply not financially equipped to accept an invitation to participate in a national, multiyear effort on a volunteer basis.

\textsuperscript{15} Study Group Report, supra note 13, at 37. The rebuttable presumption rule provides that the noncomplying secured party is barred from recovering a deficiency unless it overcomes a rebuttable presumption that compliance with Part 5 would have yielded an amount sufficient to satisfy the secured debt. \textit{Id.} at 199-201. \textit{See generally} Fred H. Miller, \textit{The Revision of UCC Article 9}, 47 Consumer Fin. L.Q. Rep. 257, 258 (1993) (summarizing study committee’s recommendations).

\textsuperscript{16} The absolute bar rule provides that the noncomplying party is absolutely barred from recovering deficiency. Study Group Report, supra note 13, at 201.

\textsuperscript{17} Id.

\textsuperscript{18} Study Group Report, supra note 13, at 41. The current draft section implementing this recommendation would do so only for commercial collateral. Uniform Commercial Code Revised Article 9, Part 5. Default (With Section 9-105) § 9-505 (Discussion Draft Feb. 8, 1994) [hereinafter Discussion Draft, Feb. 8, 1994].

\textsuperscript{19} Study Group Report, supra note 13, at 42. To the credit of the drafters, the draft goes in the opposite direction for consumer collateral, expressly recognizing constructive strict foreclosure. Discussion Draft, Feb. 8, 1994, supra note 18, at 35-36, reporter’s note.
The published reports on the drafting committee's work to date suggests that it is providing a number of increased rights to creditors. One commentator has suggested that these rights would include allowing "pre-default waivers of creditor misbehavior under Article 9."20 Another right for creditors which appears likely to be added to the draft is a change in section 9-502 to permit a secured creditor to enforce all rights of its debtor against the account debtor rather than simply the right to make collections or take control of the proceeds.21 These rights would then be available without any provision creating them in the security agreement. The drafting committee is also discussing a safe harbor form of notice for creditors disposing of collateral.22

B. Nature of Improvements Being Sought in Article 9 for Consumers

Despite the initial focus on creditors' issues, there are many improvements required to make Article 9 better for consumers, including:

1. a standard of commercial reasonableness to promote crediting of at least the full wholesale value of the goods against any potential deficiency;
2. adoption of the absolute bar rule in transactions for a consumer purpose or transactions involving consumer goods or intangibles as security;23
3. statutory damages to work in conjunction with an absolute bar rule to deter violations of Article 9 disposition rules;
4. attorneys fees to prevailing consumers who enforce their Article 9 rights;
5. a right to cure prior to repossession except in extraordinary circumstances;
6. restrictions on pre- and post-default waivers by consumers;24

20. Article 9 Drafting Committee Holds Second Meeting in Boston, CLARKS' SECURED TRANSACTIONS MONTHLY, May 1994, at 1, 6-7. This would not apply to the guarantor who provides a lien on its own property as collateral.
21. Id.
23. This was recommended by the Study Committee, STUDY GROUP REPORT, supra note 13, at 37.
24. The present draft recognizes that these should be restrictions on waiver in secured transactions where a consumer is a party. See Discussion Draft, Feb. 8, 1994, supra note 18, § 9-501(c).
(7) disclosure of the manner of calculating a deficiency preceding or accompanying attempts to collect it;

(8) a restriction on the taking of nonpurchase money consumer goods collateral which lacks significant resale value;\(^{25}\)

(9) restrictions on the amount awardable under attorneys fee clauses favoring secured parties; and

(10) the addition of an objective standard of good faith for Article 9.\(^{26}\) Consumer advocates are also seeking to restrict the expansion of Article 9 to intangible assets held by consumers such as their deposit accounts, insurance claims, and tort claims.\(^{27}\)

Overlying these issues is the definition of the type of transaction to which any “consumer transaction” rules in revised Article 9 will apply. The reporters initially suggested a “menu” approach in which each state would choose from a series of factors such as whether the collateral is consumer goods, the dollar amount of the transaction, and perhaps other factors. A menu approach sacrifices the basic goal of uniformity and creates serious choice of law issues. It also creates a risk that consumer transaction rules could be eviscerated on a state by state basis. This evisceration could occur by manipulating the allowable factors in the consumer transaction definition to minimize the scope of the consumer transaction provisions. These problems and the serious difficulties with limitations by dollar amount and by sub-

\(^{25}\) This is a subtle issue. The purpose of collateral is to provide something of value that could be sold to repay all or part of a debt. In small consumer loans, however, there have been some lenders who have taken security interests in items of importance to consumers, even though those items have virtually no resale value. These items tend to be things commonly found and used in the home, such as used stereos, VCRs, or TV sets. The Federal Trade Commission (FTC) Credit Practices Rule does not effectively forbid this practice. The Rule forbids taking a nonpurchase money security interest in household goods, but it defines household goods to exclude home electronic equipment, except for one radio and one TV, and to exclude personal jewelry, except wedding rings. FTC Credit Practices Rule, 16 C.F.R. § 444 (1994).

The only reason for a creditor to take a nonpurchase money security interest in something which has little or no resale value is to use the threat of taking away the item as a “club” in collection activities. This illegitimate use should not be permitted by Article 9.

\(^{26}\) The study committee recommended that the drafting committee “give serious consideration to revising the definition of good faith in section 1-201(19) as applied to Article 9 by adding ‘the observance of reasonable commercial standards of fair dealing’ to the current standard of honesty in fact.” STUDY GROUP REPORT, supra note 14, at 248 (citing U.C.C. §§ 2-103(b), 2A-103(3), 3-103(a)(4), 4-104(c), 4A-105(a)(6)).

\(^{27}\) This issue, and several of the other issues mentioned here but not fully explored, are discussed in Gail K. Hillebrand, The Revision of Article 9 of the Uniform Commercial Code: Issues for Consumers, 27 UCC L.J. 179 (Fall 1994) [hereinafter Hillebrand, The Revision of Article 9].
type of collateral within the general category of consumer goods have been discussed in detail elsewhere.  

This essay will discuss two important ways to bring balance and fairness to Article 9. The first way is to overhaul or replace the “commercial reasonableness” standard for measuring allowable deficiencies after disposition of security. The second is to include some of the concepts from the Uniform Consumer Credit Code.

IV. The Need to Overhaul or Replace the Commercial Reasonableness Standard

A. Failure to Ensure Reasonable Credit Against Debts for the Value of Repossessed or Surrendered Collateral

The commercial reasonableness standard has been a failure for consumers. It has not ensured that consumers will receive a credit on the debt of anywhere near the amount of even the wholesale value of the collateral. Consumer advocates report that at the sale of repossessed cars, they see bids that are much lower than the value of the car. They also report that it is extremely rare, if not entirely unknown, for even the wholesale value of a car to be bid at a dealer auction. For example, in Southern California a 1988 Volkswagen Jetta was sold at a disposition sale by a creditor for $3950. The wholesale “Blue Book” value for that Jetta was $5175. The retail Blue Book value was $7500. Because of the low amount credited from the sale, this Southern California consumer owed a deficiency balance of $4654.

A consumer from Northern California surrendered a car to the lender. In March 1994 the lender sent a notice of deficiency balance informing the consumer that the 1989 Nissan Maxima had been sold for $5600. The wholesale Blue Book value for that make and model year car was $8075 to $8750, depending on the exact model. The retail Blue Book value was $11,600 to $12,450.

An even more extreme example of a low amount credited to a debt after a disposition sale involves a mobile home owner in South-
ern California. The consumer had paid $44,000 for a three bedroom, two bath Skyline mobile home in 1987. The consumer surrendered the home to the bank lender in January 1993. The bank took one year to sell the mobile home, incurring $6000 in mobile home space rental. Finally in May 1994, in response to telephone inquiries, the bank informed the consumer that the home had been sold for $2000. Not only did the bank credit the consumer a mere $2000 for a three-bedroom mobile home, it also sought an additional $6000 for mobile home space rental during the year between the consumer’s surrender and the bank’s sale. The bank is seeking payment of approximately $40,000 from this consumer and a cosigning relative.32

These examples of disposition sales that failed to return anything approaching the real value of the collateral are not isolated horror stories. Published and unpublished studies show that these individual consumer stories are examples of the commercial reasonableness standard’s long-standing and continuing failure to ensure that sales are conducted in a manner that results in a credit of even the full whole-sale value of repossessed vehicles.

1. Published studies show debtors do not receive the full retail or wholesale value as a credit after a disposition sale

Studies of collateral sales in the District of Columbia in 1970 and in Connecticut in the late 1960s showed that creditors disposed of automobile collateral for only 71% to 81% of its wholesale value.33 The Connecticut study reported that repossessed or surrendered cars were

32. One idea that is sometimes discussed in connection with Article 9 is permitting consumers to bid on their former property at the post-repossession sale. This idea is usually dismissed on the ground that if a consumer could not afford to make the loan payments, he or she certainly could not afford to buy outright at the sale. This example, however, shows that when sale values are low, the consumer, and particularly any cosigner for the consumer, would be much better off bidding and purchasing at the sale. In the mobile home example, the consumer’s relative who cosigned for the original loan, faces the bank’s attempt to collect $40,000. If the relative had known of and bid at the sale, he or she could have chosen to pay $2000, and at least acquired ownership of the mobile home for which he or she now owes this large debt. Allowing the cosigner or other individual guarantor to bid at the foreclosure sale would not hurt the lender. Regardless of who bids, the lender is paid the same amount—or perhaps more—if the presence of an outsider willing to bid drives up the price.

sold at disposition sales for an average of 51% of their retail value and 71% of wholesale value. These sales establish the amount to be credited to the consumer's debt. The very same cars that brought 51% of retail at the disposition sale were then resold three to five months later for 92% of retail value. In the Connecticut study, Professor Shuchman also described some disposition sales where the identical car was sold at a second sale for two-and-a-half to three-and-a-half times more than the price it brought at the sale which established the amount to be credited against the deficiency.

In the District of Columbia study, Firmin and Simpson reviewed data from 284 auto deficiency cases brought by dealerships, finance companies, and banks located in the District of Columbia, Maryland, and Virginia. In 106 of these cases, they were able to trace the car past the disposition sale, or first resale, to the next time it was sold. Firmin and Simpson found that according to values published by the National Automobile Dealers Association, the average price paid at the first resale—the one that established the amount to be credited against the debt—was only 62% of retail and 81% of wholesale. The prices paid on the second resale—which benefits only the first buyer and not the debtor—averaged 110% of retail.

34. Shuchman, Profit on Default, supra note 33, at 23 (citing CONN. GEN. STAT. ANN. § 42-98(F) (1960)).
35. Id. at 31-33. The Firmin & Simpson study also shows that these same cars are sold for their retail market value on the second resale. Firmin & Simpson, supra note 33, at 518, 520. The first resale (the disposition sale) is generally a private sale open only to automobile dealers. The second resale, conducted by car dealers who were purchasers at the disposition sale, results in the highest possible price, because it is generally public, well advertised, and takes place on a dealer's car lot designed to attract a large number of buyers. Id. at 519-20.
36. Shuchman, Profit on Default, supra note 33, at 26-27.
37. Firmin & Simpson, supra note 33, at 517 n.34. To locate suits seeking deficiencies, Shuchman, and Firmin & Simpson, first examined the police blotter containing a list of all automobile repossessions reported to the police, thus identifying the most active reposseors, who in turn are likely plaintiffs in deficiency judgment suits. Id. at 532-33. They then searched the municipal court's plaintiff index for those agencies identified in order to gather all deficiency judgment suits filed. Id.; Shuchman, Profit on Default, supra note 33, at 57, 58. One drawback to the police blotter-search method is that voluntary surrenders in lieu of repossession would not be reported to the police. Firmin & Simpson, supra note 33, at 533.
38. Firmin & Simpson obtained the second retail price by checking the title certificate of the purchaser at the second resale. Firmin & Simpson, supra note 33, at 534. In the District of Columbia, where the study took place, the authors used the automobile's serial number to obtain access to the application for title, which must be filed by any individual who registers a newly acquired car in the District of Columbia. This application contains the price paid for the vehicle. Id.
39. Id. at 520.
Another study, by Corensweit, looked at 200 deficiency suits filed in Alameda County, California, between 1971 and 1973. Corensweit found that the amount credited to the debtors from sales of surrendered or repossessed vehicles averaged 64% of the vehicle’s retail Blue Book value and 84% of its wholesale Blue Book value. This California study found that auto dealers paid significantly less than individuals when buying at disposition sales. Dealers paid only 50% of retail Blue Book while individuals paid 86% of retail Blue Book. This disparity existed whether the cars being sold were new or used. Dealers purchased new cars at 61% of retail while those sold to individuals brought 95% of retail. Used cars brought 50% of retail when sold to dealers and 75% when sold to individuals. Corensweit also found that out of 200 complaints for deficiency judgments, about 20% of the deficiencies would have been eliminated if the car had been sold for its wholesale value. In those cases, the average disposition sale price was about $700 below wholesale.

2. Recent work shows that the problem of low values at disposition sales has persisted

The West Coast Regional Office of Consumers Union has performed new research showing that low values on disposition sales of automobile collateral is a continuing problem. This research showed that repossessed or surrendered automobiles were still sold for much less than either their wholesale or retail market values. The West Coast Regional Office of Consumers Union examined court files in suits for deficiency judgments filed over a two-year period in Oakland, California. These court files revealed prices for automobile dispos-

40. Ellen B. Corenswet, Note, *I Can Get it For You Wholesale: The Lingering Problem of Automobile Deficiency Judgments*, 27 STAN. L. REV. 1081, 1085 (1975). Corenswet, who conducted her study in California, was not able to obtain second sale prices because she was not able to locate second purchasers. *Id.* at 1084. Within their jurisdictions, many state departments of motor vehicles retain records of all sales of a vehicle. California, however, retains information only about a vehicle’s most recent transfer. *Id.* at 1084 n.15.

41. *Id.* at 1086.
42. *Id.* at 1086-87.
43. *Id.* at 1087.
44. *Id.*
45. *Id.* at 1086-88.
46. Thipphavone Phabmixay, Fellow for Economic Justice, performed the research at the West Coast Regional Office of Consumers Union in June and July of 1994. Seventy automobile deficiency suits were reviewed, but the number was reduced to 50 cases due to incomplete court records. In those cases, the suit was dismissed before filing because of the creditor’s memorandum describing the vehicle and the sale, or because the automobile was a make or model not included in the Blue Book.
tions which averaged only 53% of the Blue Book retail value and 73% of the Blue Book wholesale value. In only one of fifty cases did resale price equal or exceed the Blue Book retail value; and in only eight of fifty cases did resale prices equal or exceed the Blue Book wholesale value. The low prices at these disposition sales cannot be attributed to the cars’ condition. The creditors characterized the vehicle’s condition as average or good on a court-required report in forty-seven of the fifty cases in the sample.

Consumers Union obtained these results after examining information from court files of over fifty automobile deficiency judgment suits filed in the Oakland Municipal Court from January 1992 to May 1994. Consumers Union’s researcher compared the amounts paid at those sales to Blue Book wholesale and resale used car values. The 1994 study by the West Coast Regional Office of Consumers Union was modeled after the Corenswet study published in 1975. Consumers Union examined deficiency suits from the same city, in the same court, and for the same length of time as those analyzed by Corenswet. Consumers Union’s research shows results quite similar to those in the same city twenty years earlier: Automobile collateral dispositions returned significantly less than both the retail and wholesale value of the vehicles.

The following table compares the results reached by Shuchman, Firmin and Simpson, and Corenswet, with the results of the more recent work by the West Coast Regional Office of Consumers Union:

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47. Corenswet, supra note 40, at 1084-85.

48. Consumers Union’s methodology was as follows: First, the researcher examined the plaintiff index for the names of all automobile dealers, finance companies, and collection agencies that brought suit within the first five months of 1994, thus identifying the entities that brought the most automobile deficiency suits in this period. All automobile deficiency cases brought in this period were brought by one automobile finance company. After identifying the party most likely to sue, Consumers Union’s researcher then looked at all suits filed by that party from January 1992 to May 1994. In all, the research uncovered over 70 automobile deficiency judgment suits in the Oakland Municipal Court. Each file was examined for the following information: (1) the year, make, model, and vehicle identification number of the automobile; (2) the condition of the automobile as described by the creditor; (3) the dealer and finance company involved in the transaction; (4) the date of the sale; (5) the identity of the buyer; (6) the resale price; and (7) the date of suit. The researcher then compared resale price to the Blue Book wholesale and retail values of each car on the date of resale. Next the percentage of retail value and wholesale value realized upon resale were calculated.
Percent of Value Obtained

<table>
<thead>
<tr>
<th>Study</th>
<th>Year</th>
<th>Retail</th>
<th>Wholesale</th>
<th>Second Resale</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shuchman</td>
<td>1969</td>
<td>51%</td>
<td>71%</td>
<td>92%</td>
</tr>
<tr>
<td>Firmin &amp; Simpson</td>
<td>1971</td>
<td>62%</td>
<td>81%</td>
<td>110%</td>
</tr>
<tr>
<td>Corenswet</td>
<td>1975</td>
<td>64%</td>
<td>84%</td>
<td>n/a</td>
</tr>
<tr>
<td>Consumers Union</td>
<td>1994</td>
<td>53%</td>
<td>73%</td>
<td>n/a</td>
</tr>
</tbody>
</table>

The studies in the District of Columbia, Connecticut, and Oakland, California, identified the problem more than twenty years ago. That problem appears to be even worse today in Oakland. In 1975, Corenswet reported that automobile collateral was disposed of for an average of 64% of its retail value and 84% of its wholesale value. Consumers Union found in 1994 that automobiles serving as collateral were sold for 53% of their retail value and 73% of their wholesale value.

3. Possible reasons for low values on disposition sales

These published studies and the newer data show that the Article 9 standard of commercial reasonableness has not resulted in sales that provide consumers with credit for the true value of the collateral surrendered or lost to repossession. It may seem surprising that a creditor would willingly sell an item for less than its full wholesale value. However, auto financiers may have business arrangements that insulate them from the ill effects of low sale prices. Creditors who purchase notes from automobile dealers often require the auto dealers to compensate them for losses suffered when car buyers default on loans the dealer originated.49 In addition, a creditor may have an incentive other than minimizing the deficiency when it sells a repossessed car or other consumer good. The creditor may wish to sell promptly even if few people attend an auction sale. There may be other business relationships between the creditor and the buyer of the collateral—such as a car dealer—that make a low price beneficial to

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49. David B. McMahon, Commercially Reasonable Sales and Deficiency Judgments, Under UCC Article 9: An Analysis of Revision Proposals, 48 CONSUMER FIN. L.Q. REP. (forthcoming 1994); Shuchman, Profit on Default, supra note 33, at 24-26; Corenswet, supra note 40, at 1081-82. The structure of one such reserve account is discussed in the Amended Answer and Counterclaim, National Bank of Commerce v. Smith, (Kanawha County Cir. Ct. W. Va., 1990) Nos. 89-C-934 and 89-C-2679, consolidated (on file with author).
both. For example, the financing institution may be purchasing large amounts of automobile paper from a car dealer and may desire to continue that arrangement.50

There could also be an unreasonably low value at a sale simply because a custom and practice now exists in which everyone knows that only dealers will be bidding. Therefore, it is not necessary to approach the full wholesale value in order to buy the car at such a sale.

B. Two Solutions to the Problem of Low Values Credited After Post-Repossession Sales

1. A fair value credit rule

There are two practical ways to address the problem of low values at sales after repossession or surrender. The best approach, however, is to require any creditor who seeks to collect a deficiency to first credit against the debt at least the fair value of the goods, at the time of repossession or surrender, less necessary costs of maintenance and sale of the goods.51 It is easy to measure fair value for automobiles, which are the most common type of consumer collateral involving potentially large deficiencies. Creditors could be given certainty with a presumption that the fair value would be the Blue Book value for that make, model, and year of car in average condition. An exception to this general safe harbor would permit an even lower value if the creditor proves in court that the car was in especially poor condition.

A fair value credit approach, with implementing presumptions, has many strengths. First, it is consistent with reasonable consumer expectations. Consumers who surrender vehicles on request from creditors often think that the surrender unwinds the transaction and that there will be no deficiency. However, to the extent that the surrendering consumer or one suffering repossession expects a deficiency, common sense suggests that the consumer expects to be credited with the full value of the repossessed or surrendered collateral, not with just a fraction of its wholesale value. Second, a rule requiring credit for the fair value of consumer goods collateral would leave creditors free to choose how to sell the goods. The creditor could choose whether to (1) maximize the value secured at the sale, or (2) accept a lower price in order to maximize convenience or to foster

50. The Washington, D.C., study found that in 71% of the cases the creditor sold the car at the disposition sale to the same dealer that had sold the repossessed car to the consumer in the first place. Firmin & Simpson, supra note 33, at 517.

51. For a more complete discussion of a formula that could be used to implement this suggestion, see McMahon, supra note 49, at 30.
business relationships with third parties. In either case, the consumer would receive the same amount of credit against the debt. Third, the use of implementing presumptions tied to prices published by independent third parties could provide certainty for creditors.

2. An antideficiency rule for consumer debts secured by nonluxury goods collateral

Another approach to the problem of the failure of the commercial reasonableness standard is to adopt a simple antideficiency rule for most secured consumer transactions. Such a rule could apply to all deficiencies on debts secured by consumer goods, perhaps with a "luxury goods" exception.

An antideficiency rule would be a simpler way to ensure that unfair deficiencies are not pursued against consumers. Such a rule would be overbroad only in the rare case in which the creditor secures the fair value for consumer goods collateral. However, the data from the late 1960s to the present shows that creditors regularly dispose of collateral for significantly less than both the wholesale and retail value.\textsuperscript{52}

The dollar limit, if any, to be chosen in implementing an antideficiency rule in consumer transactions is a delicate question. Some suggest that a dollar ceiling should be adopted because affluent consumers who can purchase—for example, a yacht or a Jaguar—are less deserving of protection than other consumers. A high dollar ceiling, such as $100,000, could eliminate such cases.

A more traditional approach to the issue of what debts should be covered by an antideficiency rule for consumer transactions would be to pick some number that is somewhat higher than the probable deficiency for most consumers.\textsuperscript{53} Unfortunately, this approach can lead to a woefully inadequate dollar ceiling in an act with a long lifespan. The revisions to Article 9 probably will be promulgated in 1996 or 1997

\textsuperscript{52} See supra part IV.A.1-2.

\textsuperscript{53} The Uniform Consumer Credit Code (UCCC) antideficiency provision provides that a consumer is not liable for a deficiency where: (1) the collateral was part of a consumer credit sale; or (2) the lender is subject to claims and defenses because it has made a consumer loan enabling the consumer to buy or lease a particular item. U.C.C.C. § 5.103(1) (1974). For these loans, the UCCC provides that there is no deficiency when the seller repossesses or accepts surrender of the goods if the cash sale price was $1750 or less. \textit{Id.} at § 5.103(2)(3). Using the inflator selected under UCCC § 5.103(8), $1750 in January 1967 dollars would be $7777 in January 1994 dollars. The UCCC calls for adjustments to be made using the changes in the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers: U.S. City Average, All Items, 1967 = 100; comparison between 1967
and adopted in the three- to five-year period following 1997. This means that the drafting committee is now writing proposed legislation that many states may not enact until the year 2000. By that time the last revision of Article 9, the 1974 revision, will have lasted approximately 25 years. The drafting committee must determine how to draft a new Article 9 that will last for a similar period of time. Any dollar ceiling on antideficiency protection that is based on current average deficiencies will become quickly and thoroughly out of date. Selecting a dollar ceiling that is high enough to include all consumer transactions, except the clearly luxury transactions, could minimize this problem.54

Consumer credit counselors have told this Author the average deficiency that they now see is commonly $2000 to $4000. These deficiencies arise from original debts of approximately $7000 to $9000. Others have reported higher deficiencies. The deficiency amount seems to be driven not by absolutes, but rather by the price of a car.55 Contrary to what some have suggested, deficiency issues seem to arise just as frequently with respect to new cars as they do with used cars. Thus, a ban on deficiencies of $5000 or $7500 would not remain useful for long, even at today's historically low inflation rates. Assuming a continuation of the low inflation rate experienced the last ten years and a correspondingly low increase in the Consumer Price Index (CPI), which excludes the historically high inflation rates of the late 1970s and early 1980s, a $5000 figure selected in 1994 would be worth only $1944 in 1994 dollars by the year 2020.56 A $7500 figure would

and 1994 was made using CPI, All Urban Consumers, U.S. City Average, All Items, 1982-84 = 100. Id. § 5.103.

For an antideficiency standard using this approach to be effective today, it would have to recognize and accommodate the startling increase in the price of one of the most frequently financed consumer goods—the automobile. In 1967, when the UCCC drafters selected a sale price of less than $1750 as the “no-deficiency” cutoff, the average price of a new domestic car was $3310. In 1993, the average price of a new domestic car was $17,263.54 The California Legislature apparently chose such an approach to dollar ceilings that it was using in connection with a different issue when it amended California Commercial Code § 9-504 in 1990. CAL. COM. CODE § 9-504 (West Supp. 1994). Under § 9-504, an absolute bar rule applies to secured transactions entered into primarily for personal, family, or household purposes where: (1) the collateral was consumer goods, and (2) the debt immediately before the disposition was $100,000 or less. Id. § 9-504(2)(d)(i). The absolute bar rule also applies to all other secured transactions, if the amount of the debt immediately before the disposition was $50,000 or less. Id. § 9-504(2)(d)(ii).

55. The original debts may be lower than the average price of new automobiles due to the wide range of automobile prices, down payments, and the distorting effect of including used cars as well as new cars in this average.

56. This calculation uses the U.S. Department of Labor Bureau of Labor Statistics Consumer Price Index-All Urban Consumers, U.S. City Average, All Items 1982-84 = 100.
be worth only $2916 by the year 2020. Even if these revisions to Article 9 were to last for a far shorter period than the current Article 9, a low ceiling would still be significantly out of date just ten years after being enacted. By the year 2010, for example, a $5000 number selected today would be worth only $2796 in 1994 dollars. A $7500 figure would be worth only $4195 by the year 2010. These disparities would be even more severe if inflation were to increase from its recent low levels.

If a dollar ceiling approach is used, it becomes critical to tie the ceiling to the amount of the deficiency before additional charges for storage, reconditioning, repossession, attorneys fees, collection costs, or other allowable expenses are added. The amount of these charges are partially within the creditor’s control. For example, the creditor makes decisions about how much reconditioning to perform. Excluding charges within the creditor’s control when determining whether the amount of the deficiency falls within an antideficiency rule is the only way to ensure that the threshold cannot be manipulated. If the deficiency is greater than the threshold, those additional items could be included to the extent otherwise permitted by Article 9 or other law.

Another problem with selecting a relatively low amount as a trigger for a consumer antideficiency rule is that it would not address a major area of need: the consumer who buys and finances a mobile home. In urban areas, mobile homes have very little resale value unless they are sold “in place” at a park in which the coach is entitled to remain. Mobile home dealers and park owners who sell homes on their own behalf are able to arrange for these preconditions to be met. If the lender does not arrange for an in-place sale, a mobile home is likely to bring a very small price relative to both its in-place value and to the debt. The example from Southern California discussed earlier illustrates this problem.57

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57. See supra part IV.A.

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This is the index recommended in the UCCC. This Author averaged the percent change in the CPI from December of each year, 1984 through 1993. The average percentage increase was 3.7%. Using the December 1993 index of 145.8, projections for December of each year were made by increasing the index of the prior December by 3.7%. The projected indexes are: (1) 151.20 in 1994; (2) 270.39 in 2010; and (3) 388.85 in 2020. To calculate the percentage increase in consumer prices, the Bureau of Labor Statistics’ formula was used—\(\frac{(\text{index}-\text{previous index})}{\text{previous index}} \times 100\) = percent change. Conversion of the value of ceiling amounts in future years to 1994 dollars was calculated using the following formula: value in 1994 = \((\frac{1}{(1+\text{percent change})})(\text{ceiling})\).
Mobile homes are an important source of housing for working class, elderly, and low-income Americans. Surely no one would argue that a mobile home is a luxury item, although a vehicle that costs the same amount today as a new mobile home might be a luxury item. Thus, if a dollar amount approach is used, there should be an exemption for mobile homes, regardless of dollar amount. A simpler way to avoid these problems would be to adopt an antideficiency rule for all consumer goods, except certain well-defined luxury goods identified by type.

The most serious and continuing problem which consumers have faced under Article 9 is its utter failure to ensure that consumers receive a credit against their deficiency for the true fair market value of repossessed or voluntarily-surrendered goods. The Article 9 Drafting Committee and the NCCUSL now have an extraordinary opportunity to resolve this serious and continuing problem. This opportunity should not be missed.

V. BASELINE STANDARDS FROM THE UNIFORM CONSUMER CREDIT CODE FOR SECURED CONSUMER TRANSACTIONS

The drafters of the Uniform Consumer Credit Code (UCCC) appropriately recognized that the baseline rules for consumer credit transactions should differ from those for commercial transactions. A new Article 9 that will be fair when applied to both commercial and consumer transactions should include some of the principles from the UCCC. These principles include: (1) an unconscionability provision such as UCCC section 5.108 and UCC section 2A-108; (2) a restriction on attorneys fees clauses running against consumers as is found in UCCC section 2.507; (3) a requirement for notice and a right to cure similar to UCCC sections 5.110 and 5.111; and (4) a requirement for adequate allegations in the event of a deficiency action such as UCCC section 5.114(1) and (2). 58

58. U.C.C.C. § 5.103 (1974). There are a wide variety of other provisions in the UCCC that this Author, and probably many other consumer advocates, would like to see in Article 9—including restrictions on maximum rates of interest. This Author’s understanding of the role that NCCUSL has undertaken is that it will not entertain any such proposals for price regulation. Indeed, in earlier discussions with representatives of the Conference about Articles 3 and 4, it was clear that many basic consumer protections were regarded by participants in the Conference process as “regulatory,” and therefore best left to other areas of the law. However, leaving consumer issues to other law is politically unrealistic, and in fact frequently means that those issues will not be addressed at all.

A revision of Article 9 is likely to have numerous provisions desired by creditors, and thus certain political momentum. A separate proposed act or subchapter solely addressing consumer issues will have no such momentum, and is highly unlikely to receive the same
In the UCCC's official text, the National Conference of Commissioners on Uniform State Laws recognizes that "adequate protection of consumers from creditor practices and agreements that are abusive or have a potential for abuse" is a "basic issue in the regulation of consumer credit." Article 9 is one source of law governing consumer credit, and it should contain provisions to prohibit and deter abusive practices.

A. An Unconscionability Standard for Article 9

The current Article 9 does not contain an express rule against unconscionability. Unconscionable conduct in connection with the disposition of collateral should fail any standard of commercial reasonableness. There are, however, aspects to the secured transaction other than the disposition of collateral. The evils of unconscionable inducement, terms, and collection practices were recognized by the Conference when it promulgated section 2A-108. An earlier precedent is found in UCC section 5.108.

The existence of the federal Fair Debt Collection Practices Act (FDCPA) does not eliminate the need for an Article 9 prohibition on unconscionability. The FDCPA only applies to the collection of debt. The Act does not measure or address the conscionability of conduct leading to the creation of a security interest, nor does it address the inducements, if any, to provide the security interest. The unconscionability in the inducement aspect could be particularly important for consumer guarantors and cosigners, because they frequently lack a full understanding that they are obligating themselves equally and fully to the debt. Conduct that creates or fosters this belief could well be unconscionable.

acceptance as will provisions addressing consumer credit transactions which are woven into the fabric of the revised Article 9. For this reason, it is not appropriate to postpone consumer issues for separate treatment or to segregate all the consumer rules into one part of the revised Article 9. Instead, the revision must evaluate how each of its new rules will affect consumers and, where appropriate, modify the proposed rule to ensure it will operate fairly in consumer transactions.

60. The drafting committee for Article 2 has made a tentative decision to include the inducement standard from § 2A-108 in Article 2. Although that drafting committee did not adopt the unconscionable collection provisions from § 2A-108, such a provision seems even more appropriate for Article 9. If the goods are financed, a prohibition on unconscionable collection activity in Article 9 would make a similar provision in Article 2 unnecessary. If the goods are not financed, no provision on collection activity is needed for Article 2.
62. See id. § 1692(e).
The federal FDCPA also does not directly address the handling or disposition of the security, although a party could try to raise these issues under the FDCPA's general provisions for disputing the amount owed. The FDCPA also does not reach in-house collectors or their conduct. Additionally, not all states have debt collection acts and even in those states that do, some acts fail to cover in-house collectors.

One concern that might be raised about an Article 9 prohibition on unconscionable collection conduct is the selection of an appropriate remedy. Apparently, the Article 2 Drafting Committee was motivated by this concern when it declined to adopt the unconscionable collection activity portion of section 2A-108. The Consumer Advocacy Committee of the Legal Services Section of the California State Bar has suggested a cure for concerns about open-ended remedies for unconscionable collection activity. It suggests that "the remedy for unconscionable collection conduct should be the creditor's forfeiture of the payment(s) and/or interest collected by virtue of the unconscionable conduct."67

The unconscionability provisions of both section 2A-108 and UCCC section 5-108 provide for attorneys fees to be awarded to a prevailing consumer. A consumer may suffer an adverse fee award only if for bringing or maintaining an action that he or she knew to be groundless. This provision should be included in any Article 9 unconscionability provision in order to encourage and assist consumers to enforce the act's requirements.68

B. Restriction of Amounts Awardable Under Attorneys Fees Clauses in Favor of Creditors

UCCC section 2.507 contains two alternative methods for restricting attorneys fee clauses running against consumers in credit

63. See id. §§ 1692e(2), 1692g(a).
64. See id. §§ 1692a(6), 1692, 1692b-1692i, 1692k.
68. For a discussion of the need for consumer attorneys fees provisions in connection with Article 2, see supra text accompanying notes 11-12.
agreements. Alternative A is a flat prohibition on a contractual clause providing for the consumer to pay the creditor's attorneys fees. Alternative B permits attorneys fees clauses in most consumer loans, but provides generally that the fees may not exceed 15% of the unpaid debt after default. It also limits attorneys fees to fees for outside attorneys, not those employed by the creditor.69

Alternative B presents a very useful default rule for Article 9. It could operate in those states which have not adopted either a prohibition or stricter restriction on creditor attorneys fee clauses. If such a provision were added to Article 9, it could simply state:

With respect to a transaction with consumer goods or intangibles as collateral and a consumer borrower or a consumer guarantor, the security agreement may not provide for payment by the consumer or consumer guarantor of attorneys fees in excess of 15% of the unpaid debt after default and disposition of collateral. The agreement may not provide for payment of attorneys fees not actually incurred, or which are paid to an attorney who is a salaried employee of the creditor, and may not provide for payment of any attorneys fees other than those which are both reasonable and consistent with this limitation. A provision in violation of this section is unenforceable.70

On the general issue of attorneys fees, Article 9 should also provide for attorneys fees in favor of prevailing consumers, as a means to encourage compliance with its substantive requirements.71

C. Notice and a Right to Cure

Another pair of useful provisions are UCCC sections 5.110 and 5.111. These sections provide for notice and a right to cure before

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69. Alternative B also includes a prohibition on attorneys fees for closed-end credit with a cost of more than 18% per year and an amount financed of $1000 or less. A CPI adjustment on this amount from January 1967 to January 1994 would yield a new benchmark loan amount of $4443.80, in 1994 dollars. Given the reluctance to become involved in pricing issues shown by the National Conference of Commissioners on Uniform State Laws in connection with recently revised Articles 3 and 4, it seems unlikely that a proposal to prohibit attorneys fees against a consumer based upon the terms of the loan would be well received by the Conference. Therefore, adoption of this portion of Alternative B is not recommended here.

70. This language is based on, but not identical to, Alternative B(2) of UCCC § 2.507.

71. The drafting committee discussed this issue at its March 1994 meeting in Boston, voting to permit prevailing consumers to recover attorneys fees. The draft, however, presently takes a different approach. Reasons for such a provision are discussed in connection with Article 2. See supra part II.B.2.
repossession. The notice may be given whenever the consumer is ten days late, and it must inform the consumer of the last date upon which the payment can be made in order to allow the consumer to continue paying on the contract. Section 5.111 works with the notice of right to cure by setting forth the actual right to cure. The right to cure reaches only failure to pay. It does not extend to other types of defaults.

The comments to section 5.110 explain that the purpose of the notice of the right to cure is to “give the consumer enough information to understand his predicament and to encourage him to take appropriate steps to alleviate it.” It is further designed to prevent “the practice of some unscrupulous creditors who repossess collateral when a payment is only a day or two late.” The comments go on to explain that the notice gives the average consumer the opportunity to rehabilitate the account, to resolve a billing error, to present a breach of warranty claim, or to negotiate a refinancing or deferral arrangement if needed. These same reasons that made a notice of time to cure and right to cure a good idea twenty years ago are still present today.

D. Requirement for Adequate Notice of the Manner of Calculating a Deficiency at or Before Attempts to Collect It

Some creditors simply demand that the consumer pay a deficiency without disclosing how much was paid at the sale or credited to the debt. Indeed, this Author has reviewed demands for payment of deficiency in which the lender simply states that it “disposed of the vehicle and incurred a loss” of the amount of the claimed deficiency. Such lack of detail makes it very difficult for a consumer to know if he or she can or should dispute the commercial reasonableness of the disposition. If the consumer does not know how much was paid at the post-repossession or post-surrender sale, there is no way of knowing whether the amount being sought by the creditor as a deficiency is fair and correct. There may have been no litigation in which the consumer could learn of the calculation that led to the amount of deficiency claimed. Consumer credit counselors in California have told this Author that they see many creditors attempting to collect deficiencies in the thousands of dollars through in-house or outside collectors, rather than through litigation. UCCC section 5.114 requires that, in an action brought by a creditor against a consumer, the complaint must allege

73. Id. cmt. 3.
the facts of the consumer's default, the amount to which the consumer is entitled, and "an indication of how that amount was determined."\textsuperscript{74} An Article 9 provision could incorporate this notice concept by requiring that any demand for, notice of, or request for payment of a deficiency, whether or not in connection with litigation, provide the consumer with at least the following basic facts:

1. the date of and amount paid at any sale or other disposition of the collateral;
2. the amount credited against the consumer debt as a result of disposition of the collateral;
3. the amount of each post-default fee or charge by amount and type, including repossession charges claimed, storage charges, and any expenses claimed for reconditioning or rehabilitating the collateral;
4. the amount of any rebates of prepaid charges, such as prepaid finance charges, insurance premiums, or service contracts, credited to the debtor;
5. basic facts about the original debt such as amount of debt, principal, interest, and other charges;
6. the amount of any deficiency or surplus; and
7. the name and phone number to call for more information or to discuss the calculations.\textsuperscript{75}

This type of notice would give consumers who are faced with efforts to collect a deficiency an opportunity to learn how the claimed deficiency was calculated. Consumers, or their attorneys or lay advocates, could use the notice to determine whether all prepaid charges, including prepaid finance charges and prepaid credit insurance, were properly rebated and credited against the debt. The requirement to disclose the amount paid at the sale and credited on the debt also would help

\textsuperscript{74} The UCCC also requires verification or sworn testimony before entry of a default judgment. U.C.C.C. § 5.114(2) (1974). The Article 9 Drafting Committee, however, has shown a great reluctance to adopt burden of proof related standards, preferring to leave that to state law. Discussion Draft, Feb. 8, 1994, supra note 18, § 9-505 (reporter's explanatory notes).

\textsuperscript{75} A proposal for a required notice of deficiency along these lines has been made to the chair of the drafting committee and reporters by David McMahon, a legal services attorney from West Virginia. McMahon suggests that the notice of the manner of calculation of the deficiency be given to the debtor: (1) before the first collection communication, (2) with the first collection communication, or (3) with any other first collection action. McMahon also suggests notice when there is a surplus or the consumer has paid more than 60% of the purchase price. Letter from David B. McMahon, West Virginia Legal Services Plan, Inc., to William Burke, Drafting Committee Chair, Shearman & Sterling, Charles Mooney, Jr., Professor of Law, University of Pennsylvania, and Steve Harris, Professor of Law, University of Illinois (June 7, 1994) (on file with author).
to make a standard for measuring the adequacy of the disposition more self-enforcing, because consumers would know how much was credited from the sale.

VI. Conclusion

Although much work remains to be done, the Article 2 Drafting Committee is examining the fairness of the rules it is proposing for ordinary consumer transactions. Although there are still serious issues for consumers in Article 2, the current Article 2 draft does attempt to address some consumer problems. The drafters of Article 9 must do the same. They must wrestle with and resolve the long-standing and continuing problem that Article 9 allows creditors to pursue a deficiency against a consumer who has not received a credit for the fair value of items taken back by the creditor, as well as a host of other important issues. The next twelve to twenty-four months should reveal whether the Article 9 Drafting Committee and NCCUSL will take the steps needed to truly modernize Article 9.